No. 58

In the Supreme Court of the United States

October Term, 1961

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ELVIS E. HOWARD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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September, 1961.

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OPINIONS BELOW

The opinion of the statutory three-judge District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is published at 81 M.C.C. 35.

JURISDICTION

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Notice of appeal was filed on December 16, 1960. This Court noted probable jurisdiction on April 17, 1961, 365 U.S. 879 (R. 421) and consolidated this case with Nos. 49 and 54, which are separate appeals from the same judgment by other parties to the district court action.

Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

Some of the questions presented in this appeal are identical with those raised in *Interstate Commerce Commission* v. *J–T Transport Co., Inc., et al.*, No. 17. This case likewise involves the denial of a contract carrier permit under the provisions of Section 209(b) of the Interstate Commerce Act, as amended in 1957.

The questions common to both appeals are:

1. Whether, in passing upon an application for a contract carrier permit, the Interstate Commerce Commission is precluded by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act from giving any consideration to an affirmative showing by protesting common carriers that they are authorized, able and willing to provide a service adequate to fulfill the transportation requirements of the shippers supporting the application.

2. Whether, in applying the statutory standard of consistency with the public interest and the National Transportation Policy and the criterion of "the effect which granting the permit would have upon the services of the protesting carriers," the Commission erred in concluding that granting the permit would be inimical to the preservation of sound economic conditions in the transportation industry and would adversely affect the services of the protesting carriers by withdrawing potential traffic which the protesting carriers can handle adequately and should be

given the opportunity to handle before additional authority is granted.

In addition to these common questions, this appeal presents the following additional questions:

3. Whether the Commission's findings as to the effect of a denial upon the supporting shipper were adequate and supported by substantial evidence, and whether the district court erred as a matter of law by substituting its own findings on this issue.

4. Whether, in determining "the effect which denying the permit would have upon the * * * shipper," as required by Section 209(b), the Commission must give consideration to the proposed lower rates of an applicant for a contract carrier permit.

STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong.); and section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–412, Public Law 85–163, 85th Cong.) are set forth in the Appendix.

STATEMENT

This is a direct appeal from a final judgment of a three-judge District Court for the Western District of Arkansas, Fort Smith Division, which set aside an order of the Commission denying a contract carrier permit to E. L. Reddish (Reddish).

The Administrative Proceedings: Appellee Reddish filed an application under Section 209(b) of the Interstate Commerce Act, as amended, (Act), 49 U.S.C. 309(b), for a contract carrier permit to transport canned goods for three shippers[1] from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 States, and of materials and supplies used in the manufacture of canned goods from 30 of these States to the 4 named points in Arkansas and Oklahoma (R. 23–36, 386–387).[2] A number of rail and motor carriers opposed the application and presented evidence of their operating authorities and operations, their equipment suitable for the transportation of canned goods and their desire to provide the service required by the shippers. The hearing examiner issued a proposed report and order recommending grant of the application on the ground that need for the service had been shown (R. 365).

Upon exceptions to the examiner's recommended report and order, and replies thereto, the Commission, Division 1, issued its report and order (R. 385) rejecting the examiner's recommendation and denying the application for the stated reason that "applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy" (R. 395). The Commission made numerous subsidiary findings supporting its conclusion, stating (R. 393–395) (1) that

[1] Steel Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.

[2] The map appearing at R. 32–33 provides a good visual aid to the extensive area involved.

"Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries," (2) that the "protesting carriers are authorized to serve the origin points involved and * * * numerous points in the vast 33-State destination territory * * *," and "They are willing to make multiple pickups and they offer stopoff-in-transit delivery service," (3) that "the service required by the shippers [is in no] way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities * * * and * * * could be performed by protesting common carriers as well as by applicant," (4) "that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant," and (5) "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application." The Commission concluded: "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers * * * their support of this application rests entirely upon a desire to obtain

lower rates" which "* * * is not a sufficient basis to justify a grant of authority to a new carrier."

Appellee Reddish timely filed a petition for reconsideration and oral argument to which the protesting motor and rail carriers replied. In addition, the Contract Carrier Conference and the Regular Common Carrier Conference of the American Trucking Associations, Inc., each filed petitions for leave to intervene and the Contract Carrier Conference also sought reconsideration. By order dated December 16, 1959, the entire Commission granted both petitions for leave to intervene and denied the petitions for reconsideration.

Reddish then instituted an action in the court below to set aside the orders of the Commission. The court below permitted the Contract Carrier Conference to intervene as a plaintiff and 7 of the motor carrier protestants, 32 rail carrier protestants in Western Trunk Line Territory, and the Regular Common Carrier Conference to intervene as defendants.

The Department of Justice, representing the United States of America as statutory defendant, confessed error in its answer and actively argued for reversal of the Commission's order on the grounds that the Commission failed to give sufficient weight to the applicant's proposed lower rates and that the order was not supported by substantial evidence (R. 15).

On October 19, 1960, the District Court rendered its opinion and judgment (R. 398, 411), setting aside the Commission's orders and enjoining their enforcement and remanding the cause to the Commission for further consideration. The court held (1) that the 1957

amendments to section 209(b) forbid consideration of adequacy of existing service in determining whether a denial of a contract carrier application would adversely affect the supporting shippers (R. 406), (2) that denial of the application would adversely affect the supporting shippers as they require a special service which cannot be supplied by existing common carriers, and (3) that the Commission must consider the lower rates of a contract carrier service in its evaluation of the effect of a denial of the permit upon the supporting shippers (R. 409).

The Commission, the railroads, the motor carriers, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., took separate appeals (R. 412, 416, 418), and this Court noted probable jurisdiction (R. 421).

SUMMARY OF ARGUMENT

I

Since the question of whether the Commission may consider the availability of adequate common carrier service in passing upon applications for contract carrier permits is common to both this case and *Interstate Commerce Commission* v. *J–T Transport Company, Inc., et al.*, No. 17, October Term 1961, we respectfully refer the Court to Chapter I of the brief of the Interstate Commerce Commission in No. 17, where that question is fully discussed.

II

In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy, Section 209(b) of the Inter-

state Commerce Act requires the Commission to consider, among other things, "the nature of the service proposed." In order to fall within the term "contract carrier by motor vehicle," as defined in Section 203(a)(15) of the Act, the furnishing of transportation services, under continuing contracts with one or a limited number of persons, must be "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served" or "designed to meet the distinct need of each individual customer." The Commission found that the supporting shippers require a motor carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickup and deliveries, which service is in no way different than that which existing motor common carriers are rendering daily, by direct or joint-line service, to countless other shippers of the same or similar commodities. The district court rejected the Commission's findings and substituted its own view that the shippers require a special service and lower rates which cannot be supplied by existing common carriers. However, we show below that the Commission's findings are amply supported by the record.

In further rejecting the Commission's findings that a more positive showing than a mere generalized claim is required to establish that existing service will not meet the reasonable transportation needs of the shippers, the court below errs as a matter of law and as a matter of fact. Aside from evidence pertaining to dissatisfaction with existing common-carrier less-than-truckload rates, the record is devoid of any

substantial showing of shipper dissatisfaction with existing service, and there is substantial evidence that the protesting common carriers are able and willing to meet the shippers' needs. In order that the Commission may conduct its proceedings in a manner which will promote sound transportation it must be allowed to reject generalized claims of inadequacy of existing service when the overwhelming evidence is to the contrary. Dissatisfaction with a service because it is alleged that the rates are too high is vastly different than dissatisfaction because the services rendered do not meet the shippers' transportation needs. The Commission's judgment in this regard is reasonable and conforms to the policy of the Act. Proper utilization of the Commission's expertise in transportation matters requires that this Court sustain the Commission's power to reject unsupported generalized claims of inadequacy and require specific proof thereof before finding that the granting of a permit to conduct a new operation will be consistent with the public interest and the National Transportation Policy.

We submit that in substituting its own judgment, findings, and evaluation of the record for those of the Commission, the district court usurped the Commission's administrative function, calling for the application of the principle expressed by this Court in *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 513, 535–536. By Section 209(b), Congress empowered the Commission to exercise its judgment to determine the nature of the service proposed and the effect of a denial upon the shipper. Proper ad-

ministration of the Interstate Commerce Act requires that the Commission, not the reviewing court, make these critical and difficult factual determinations.

III

In considering the effect of a grant of the permit upon the services of existing carriers, the Commission properly concluded that granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting carriers, by withdrawing potential traffic which they can adequately handle and should have the opportunity to handle before an additional service is authorized. In rejecting this conclusion, the court below placed controlling emphasis upon the claims of the shippers that existing carriers would not handle the traffic if the permit is denied, since they will resort to private carriage. Such assertions by shippers are not, and should not be controlling. *American Trucking Associations* v. *United States,* 364 U.S. 1, 18. Since the Commission relied on its *J-T* decision in deposing of this issue, and since this identical issue is discussed in the *J-T* case, No. 17, the Court is respectfully referred to the brief of the Interstate Commerce Commission in that case.

IV

A. The Commission's consistent position that rates are not relevant in determining applications for motor carrier operating authority has been judicially approved and is consistent with the Congressional policy of maintaining a sound national transportation sys-

tem by protecting that system from over-competition. The court below errs when, without citation of judicial precedent or statutory authority, it rejects this consistent practice and holds that the National Transporation Policy's goal to promote "economical" service requires the Commission to consider an applicant's proposed lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. The lower court's decision has the effect of making contract carriage a distinct mode of motor transportation apart from common carriage. We submit that the term "modes of transportation" in the National Transportation Policy is manifestly used in a broad context, distinguishing the modes by their fundamental physical characteristics, *e.g.*, rail, motor, and water, and was not intended to draw a modal line between the often overlapping services of motor common and contract carriers.

In addition, the decision below, by making rate levels a relevant issue in application proceedings, would substantially broaden the range of relevant issues and evidence in such proceedings, prolonging their disposition. Nothing in the 1957 amendments or in their legislative history suggests that Congress intended such a drastic and impracticable procedural result.

B. There is nothing in the record to support the independent finding of the court below that the applicant's proposed lower rates reflect economies and advantages of his proposed contract carrier operation in this situation. The costs of performing various transportation services vary too widely to permit a

presumption that a particular service can be performed by a contract carrier at lower costs than by common carriers.

ARGUMENT

I

THE EXISTENCE OF AUTHORIZED COMMON CARRIERS ABLE AND WILLING TO PROVIDE SERVICE ADEQUATE TO FULFILL THE TRANSPORTATION REQUIREMENTS OF THE SUPPORTING SHIPPER IS A RELEVANT FACTOR WHICH THE COMMISSION HAS THE POWER AND DUTY TO CONSIDER IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT PURSUANT TO SECTION 209(B) OF THE INTERSTATE COMMERCE ACT

This is a companion case to *Interstate Commerce Commission* v. *J-T Transport Company, Inc., et al.*, No. 17, October Term 1961, involving, in addition to the questions presented in that case, the further question of whether the Commission is required to consider the proposed lower rates of an applicant for a contract carrier permit in its evaluation, under Section 209(b) of the Act, of the effect of a denial of the permit upon the supporting shippers.

In Chapter I of our brief in this Court in No. 17, we have shown that the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to promote stability in the motor carrier transportation system by preserving it from over-competition, that the promotion and protection of adequate and efficient common carriage is a specific objective, and that these objectives are reflected in the National Transportation Policy's injunction that the Act be administered to foster sound economic conditions in transportation. There, we have

also dealt with the Commission's consistent administrative practice, prior to the 1957 amendments, under the "consistent with the public interest and the national transportation policy" standard of Section 209 (b), and have discussed the pertinent legislative background of those amendments. Consequently, we shall not duplicate that material here, but respectfully refer the Court to that discussion.

II

THE COMMISSION'S FINDINGS WITH RESPECT TO THE EFFECT WHICH DENYING THE PERMIT WOULD HAVE UPON THE SHIPPERS WERE MADE AFTER EVALUATING AND WEIGHING CONFLICTING EVIDENCE, WERE REASONABLE AND PROPER, AND SHOULD NOT HAVE BEEN OVERTURNED BY THE LOWER COURT'S SUBSTITUTION OF ITS OWN FINDINGS ON THIS ISSUE

A. There is a factual difference between this case and the *J-T Transport* case. In *J-T Transport*, the protesting common carrier is engaged in performing the same highly specialized transportation service with special equipment as was proposed by the applicant. Here, the applicant seeks to perform a commonplace service in the transportation of canned goods in standard equipment, such as the many protesting motor common carriers perform.

There is no material dispute as to the factual situation, which is fully discussed in the Commission's report (R. 388–391). Steele Canning Company, the primary shipper, ships a substantial volume of canned goods in straight truckload lots to points in the 33-

State area involved. In addition to manufacturing and selling its own canned goods, Steele purchases and distributes about 75% of Cain's and Keystone's annual production, taking title at the supplier's plant and arranging for pickup and delivery to customers by Reddish, who was granted temporary authority to conduct contract carrier operations for Steele in 1958, because a strike of Steele's drivers caused it to terminate its private carrier operations. A majority of Steele's shipments are combined loads of small volume orders for several customers requiring expeditious service. Often these combined loads are comprised of shipments picked up at more than one of the plants of its suppliers, and the movement requires up to six or more stops en route for delivery to consignees in two or more States. Its customers maintain a low inventory requiring Steele to make deliveries promptly. Steele desires a single line service to all points and asserts that on less-than-truckload shipments existing carriers are unable to provide multiple pickup and multiple delivery service, and that such existing service is not expeditious. Its support of the application is primarily predicated on its opinion that existing common carrier rates on less-than-truckload shipments are prohibitive. Asserting that its competitors ship by private carriage and that there is only a small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that it would be forced out of business if it had to ship its numerous small orders of canned goods in less-than-truckload quantities, at less-than-truckload common carrier rates, and that success-

ful operation of its business necessitates the movement of this traffic in consolidated loads, either by private carriage or by for-hire motor carriers at truckload rates. Steele desires to terminate private carrier operations because of labor difficulties, but asserts that it will continue such private operations if the application is denied without resorting to further common-carrier service because such carrier's less-than-truckload rates are considered prohibitive.

The testimony of the other two shippers in support of the application is similar. Each supplies 75 percent of its output to Steele but desires to sell a substantial portion of production to prospective customers at various points in the States involved so as not to be dependent on one large customer for sale of its products. Prior to the strike of Steele's drivers, Cain never sold direct to customers, that portion of production not sold to Steele having been purchased by other canning companies in Arkansas and Oklahoma, who picked up the freight at Cain's plant. Since the strike, Cain has made several direct sales to customers at Kansas City, St. Louis, and Chicago, where they were satisfactorily transported by Jones Truck Lines, Inc. Cain fears inability to expand its sales area if forced to ship at less-than-truckload common carrier rates, and that said carriers will be unable to handle small shipments in combined loads. Admittedly, Cain is not familiar with the service provided by existing motor carriers, and supports Reddish on inbound shipments of materials so as to insure him a balanced operation and enable him to render a better service on outbound movements. On the other

hand, Keystone has sold that portion of its production not purchased by Steele to customers at several points in the territory involved, shipping by existing motor common carrier service in truckload quantities. Such service is satisfactory, but Keystone is convinced that it would be unable to ship less-than-truckload traffic because of existing common carrier rates. Keystone desires to obtain sales and ship freight in loads requiring delivery at two or more points en route and at truckload rates for each shipment, no matter what the size thereof. This shipper operates two trucks in private carriage and asserts that it will supplement its fleet if the application is denied and its small orders increase.

A number of motor common carriers opposed the application and presented evidence of their authorities and operations. By either direct or joint-line service, they can provide service to substantially all points involved in the application. Each of the opposing common carriers operates a substantial amount of equipment suitable for the transportation of canned goods and renders a daily service to other manufacturers of the same or similar commodities, and all desire an opportunity to provide the service proposed. Although the three supporting shippers generally had knowledge of the availability of service from the protestant common carriers, none of the protestants has participated in the involved traffic of Steele because of the higher less-than-truckload rates.

The railroad protestants operate extensively throughout the territory sought to be served by Reddish. Canned goods constitute a substantial part of their traffic,[3] and they have been experiencing a sharp decline in canned goods tonnage. They have participated in outbound movements of the shippers' traffic, but to a greater extent have handled inbound movements of materials and supplies. They contended that they are able to provide the needed service and that the shippers have failed to take full advantage of their facilities and services.

On the basis of the above evidence, the Commission made findings in accordance with the requirements of Section 209(b) of the Act which the court below rejected, substituting findings of its own.

B. Section 203(a)(15), 49 U.S.C. 303(a)(15), defines the term "contract carrier by motor vehicle" to mean:

> * * * Any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation * * *, under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time

[3] The significance of this traffic to the railroads, as well as the circumstance that many of Reddish's competitors utilize common carrier service, is reflected in the fact that in the year ended June 30, 1958, it is estimated that the railroads transported 9,164,000 tons, or 45% of the total movement, of canned foods, and that the rail share is substantially greater for the longer hauls. *Transportation and Distribution of Canned Foods*, U.S. Department of Commerce, Bureau of the Census, October 1959.

> to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

This definition of a contract carrier is carried over in Section 209(b) of the Act which requires the Commission, in determining whether issuance of the permit will be consistent with the public interest and the national transportation policy, to consider, among other stated factors, "the number of shippers to be served by the applicant," and "the nature of the service proposed."

The Commission found that Reddish met the requirements of the first criterion listed in Section 209(b), the number of shippers to be served (R. 393), but determined, under the second criterion, that the nature of the proposed service (*ibid*):

> * * * requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate.[4] They

[4] Record references to such evidence as supports the findings of the Commission are interlineated here for convenience. See R. 274–277, 289–291, 302–305, 309–311, 315–316, 322–325, 331, 335, 339–341, 349–350.

are willing to make multiple pickups and they offer stopoff in transit delivery service.[5] The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities.[6] This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted.

In its opinion (R. 405–406, 409–410), the court below rejects the Commission's findings and substitutes its view that the shippers require a special service, and the lower rates of such a service, which cannot be supplied by existing common carriers.

The record conclusively establishes that Reddish does not propose to dedicate equipment to the exclusive use of any particular shipper (R. 62, 88, 107–108, 112) or to institute a specialized or distinct service which would be materially different from that offered by existing motor common carriers. Both Reddish and the existing common carriers operate with standard equipment—tractors with van semitrailers. Each offers a less-than-truckload service, i.e., a relatively small shipment from one consignor to one consignee. Each would be authorized to render truckload service, i.e., one large shipment of a specified minimum volume from one consignor to one consignee. Each would

[5] See R. 278, 290, 303, 310–311, 316, 354.

[6] R. 276–277, 290, 307, 311, 317, 339–341, 354, 358.

be authorized to render a truckload service with stopping-in-transit privileges for partial unloading, i.e., a large shipment from one consignor to a number of different consignees at different locations, with a truckload rate being assessed plus an additional charge for each stop in transit. Thus, the proposed service of Reddish is practically identical to that offered by the existing common carriers. The only difference which would distinguish his proposed service from that offered by existing carriers is Reddish's lower level of rates for a single-line service. In the actual use of his W–2 tariff,[7] which was filed to cover transportation under temporary authority, Reddish offered several stops in transit at the truckload rate and assessed no stopping-in-transit charge[8] (R. 84), although such a charge is contemplated by the tariff (R. 191), thus rendering what is tantamount to a less-than-truckload service at truckload rates.

Moreover, the only evidence in the record which would have any tendency to show distinct need for a specialized type of service is testimony to the effect that some of Steele's customers often specify certain days and times of delivery in their telephone, regular

[7] It should be noted that, in his tariff, Reddish does not obligate himself to transport loads of less than 20,000 pounds on canned goods.

[8] The Commission has consistently held that stopping-in-transit for multiple pickups and deliveries does not constitute transit services within the usually accepted meaning of that term as applied to motor carriers. They are extra transportation services for which the motor carrier is entitled to receive just and reasonable compensation. See, *e.g.*, *Multiple Deliveries, New England*, 69 M.C.C. 77, 79; *Stopping in Transit, Central Territory*, 51 M.C.C. 25, and 52 M.C.C. 59.

mail or wire orders (R. 128, 130). These customers and the area in which they are located were unnamed, and there is nothing to suggest that such customer requests preclude the use of common carrier service in Steele's operations or the canning industry generally. In the Commission's judgment, such generalized claims of need, although considered, would not justify a finding that Steele's needs were such as could not be met by existing common carrier services.

The Commission further found (R. 394):

> * * * Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations for achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that

> there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs,* we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application.

As a consequence, the Commission concluded that there "has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service," and that the shippers' support of the application rests entirely upon a desire to obtain lower rates rather than upon an inability to obtain service (R. 395).

Although apparently recognizing that the services of the existing carriers had been almost completely untried in recent years, the court below rejected the

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*Although the district court criticized this language (R. 410), we submit that the phrase "reasonable transportation needs" is merely intended to distinguish between legitimate, proven needs, and unreasonable demands bordering on shipper whim which no regulated carrier should be expected to be in a position to meet, for example, the call at midnight for a truck to be at the shipper's place of business in five minutes. Certainly, shipper needs must be evaluated realistically, and there can be no obligation to satisfy unreasonable demands for the perfect service. If this were not so, the shipper would be armed with a simple device through which it could control the granting of an application. "Reasonable transportation needs" by no means excludes special, distinct, or individualized *needs* of a shipper. He is fully entitled to have his actual needs filled and it is such needs that the Commission considered and found the existing service adequate to meet.

Commission's conclusion on the basis that the shippers are reasonably familiar with those services and had asserted that they considered them inadequate (R. 405–406, 508).

We suggest that in deciding that the Commission may no longer reject general assertions of inadequacy of existing service, the court below errs as a matter of law in restricting the Commission's function of evaluating testimony as to shippers' needs in relation to existing services. Moreover, the record in this proceeding contains no evidence establishing any inadequacy in the less-than-truckload service of existing carriers, other than that their rates for less-than-truckload shipments were higher than proposed for Reddish's contract carrier service. The Commission weighed the shippers' generalized claims of inadequacy of existing common-carrier less-than-truckload service as being too slow and too costly, against the specific affirmative evidence introduced by the protesting carriers as to the origin and destination points each was authorized to serve, their willingness and desire to obtain the traffic and make multiple stop-offs in transit for pickups and deliveries (R. 391–392), and the fact that existing service (except for Jones Truck Lines, Inc.)[10] had been almost completely

[10] Jones Truck Lines did not oppose the application because the application was tailored, by amendment at the hearing, to eliminate the points which Jones serves direct (R. 10–11). The court below, therefore, incorrectly stated that "* * * Jones Truck Lines, Inc., in Springdale, Arkansas, * * * supports the plaintiff's application to handle the less-than-truckload orders" (R. 401).

untried in recent years.[11] On balance, it found an absence of need for the proposed service.

In the face of the positive evidence of the protesting common carriers demonstrating the adequacy of their service, the Commission was justified in saying that more than general assertions are required to support a grant of authority. There is a material difference between a claim that the actual service being offered and rendered by existing carriers is inadequate because the rates are too high,[12] and a showing that shippers require a transportation service designed to meet their distinct needs which cannot be satisfied by existing carriers.

In sum, we submit that Congress has empowered the Commission to exercise its administrative judgment in determining the nature of the service proposed and the effect of a denial upon the shipper; that the Commission has reached a permissible judgment on the record before it; and that, in overturning that judgment, the district court exceeded the proper function of a reviewing court by making findings based upon its own evaluation of the evidence, *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474,

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[11] See R. 133, 151–155, 172–173, 176, 178–179, 184–187, 189, 191–192, 196–197, 199, 201, 205, 209–210, 211–212, 220, 224–225, 226, 229, 231, 242, 244, 252, 254–255, 257–258, 261, 266–267.

[12] This is not the type of situation where the Commission could authorize an additional carrier because the evidence showed that while existing carriers held adequate authority their rates were so high as to constitute an embargo on the traffic. Here the existing carriers want the traffic but have never enjoyed it. Cf., *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791 (1958); *Carl Subler Trucking, Inc., Ext. Southern States*, 77 M.C.C. 707, 713 (1958).

488; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536; *Gray* v. *Powell*, 314 U.S. 402.

III

IN CONSIDERING THE EFFECT OF A GRANT UPON EXISTING CARRIERS, THE COMMISSION PROPERLY CONCLUDED THAT GRANTING THE PERMIT WOULD BE INIMICAL TO THE PRESERVATION OF SOUND ECONOMIC CONDITIONS IN TRANSPORTATION AND WOULD ADVERSELY AFFECT THE SERVICES OF THE PROTESTING CARRIERS BY WITHDRAWING POTENTIAL TRAFFIC THEY CAN HANDLE ADEQUATELY AND SHOULD HAVE THE OPPORTUNITY TO HANDLE BEFORE AN ADDITIONAL SERVICE IS AUTHORIZED

In flatly rejecting the Commission's conclusion and rationale respecting the third criterion in Section 209(b), "the effect which granting the permit would have upon the services of the protesting carriers" (R. 394),[13] the district court concluded (R. 410):

> In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

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[13] In citing the *J-T* case, 79 M.C.C. 695, the Commission said here (R. 394):

"It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the services of the protestant."

> Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.
>
> Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. * * *

First, we note that assertions by shippers that existing common carriers would not handle the traffic if the permit were denied are not controlling. If they were, shippers could dictate to the Commission and its discretionary powers under section 209(b), and the National Transportation Policy would be wiped out. As this Court observed in *American Trucking Associations* v. *United States*, 364 U.S. 1, 18, where the question involved was standing of existing carriers to contest an order of the Commission granting new rights:

> * * * And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. * * *

The point is that, while a shipper is always perfectly free to transport its own goods, to the extent that public transportation will be utilized the able and willing existing carriers will get the traffic.

As we have shown in Chapter II of this brief, the Commission gave due consideration to the shipper's needs and properly found that the existing common carriers were fully able and willing to fulfill them. In our opinion, the real issue here is the same as that in the *J–T* case, No. 17: Whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's transportation needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carriers by withdrawing potential traffic which they can handle adequately and should be given the opportunity to handle before an additional service is authorized. Since the Commission relied on its *J–T* decision in disposing of this case, and since this issue is fully discussed in our *J–T* Brief before this Court at Chapter II., B., we respectfully refer the court to that discussion.

IV

THE COMMISSION IS NOT REQUIRED TO CONSIDER AN APPLICANT'S PROPOSED RATES IN DETERMINING AN APPLICATION FOR A CONTRACT CARRIER PERMIT

In addition to questions presented in the *J–T Transport* case, this case adds the important issue of the extent to which the Commission must consider the lower rates proposed by an applicant for a contract carrier permit. The Commission found (R. 395):

> There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common-carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

Without citation of judicial precedent or statutory authority,[14] the court below holds (R. 409) that the 1957 amendments to the contract carrier provisions of the Act overturn this long-established principle of refusing to consider rates in an application proceeding. Assuming that Reddish's lower rates result from economies and advantages inherent in contract carrier operations, and that efficient operation of the shippers' business requires a "tailored" transportation service with its lower rates, the lower court held that the National Transportation Policy's goal to pro-

[14] The 1957 amendments are not authority for displacing this principle since the question of rates is not mentioned in the amendments or their legislative history.

mote "economical" service requires the Commission to consider such lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. This was error as a matter of law and as a matter of fact.

A. THE COMMISSION'S LONG-STANDING POLICY OF REFUSING TO CONSIDER THE LEVEL OF RATES IN AN APPLICATION PROCEEDING INVOLVING THE SAME MODE OF TRANSPORTATION HAS RECEIVED JUDICIAL APPROVAL AND IS CONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY

During the more than twenty years which have elapsed since passage of the Motor Carrier Act of 1935, the Commission has consistently held that the level of rates is not a proper matter for consideration in application proceedings for motor common [15] or contract carrier [16] authority, or in proceedings for unification of motor carriers,[17] unless it is demonstrated that existing rates are so unreasonably high as to constitute, in effect, an embargo. This consistent policy has been approved by the Court in *American*

[15] See *e.g.*, *Wellspeak Common Carrier Application*, 1 M.C.C. 712, 715–716 (1937); *Detroit-Pittsburgh Motor Freight, Inc., Extension—Asphalt Roofing*, 79 M.C.C. 197, 203 (1959); *Interstate Dress Carriers, Inc., Extension—Waterboro, S.C.*, 77 M.C.C. 787, 791 (1958); *Carl Subler Trucking, Inc., Extension—Southern States*, 77 M.C.C. 707, 713 (1958). *Atlanta & New Orleans Motor Freight Co. v. United States*, 155 F. Supp. 68, 71 (U.S.D.C. N.D. Ga.—Atlanta Div.—1953).

[16] *Dixon & Koster Contract Carrier Application*, 32 M.C.C. 1, 4 (1942); *Southland Produce Co., Inc., Contract Carrier Application*, 81 M.C.C. 625, 628–629 (1959); *Motor Corp., Extension—Sugar*, 73 M.C.C. 731, 734 (1957); *Badger Trucking Co., Inc., Extension—Building Materials*, 66 M.C.C. 373, 374 (1956).

[17] *Rock Island M. Transit Co.—Purchase—White M. Freight, Inc.*, 5 M.C.C. 451, 457 (1938).

Trucking Associations v. *United States*, 326 U.S. 77, at 86, where it was observed:

> * * * It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of Section 217 of Part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of Section 220 of the same part to which other motor carriers are subject.[19] *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis supplied.]

Again, in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, at 91–92, the Court discussed, with apparent approval, the Commission's long standing practice.

> * * * The Commission asserts that it has always considered rates irrelevant in certification proceedings under §207(a), yet, with but one exception, it relied on administrative decisions involving applications by a carrier to provide service to an area already served by the same mode of transportation. * * * Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an

[19] A method of objection to improper practices, such as unreasonable tariffs or irregular accounting by motor carriers under the Interstate Commerce Act, part II, is provided by Section 204(c) as amended, 49 U.S.C. § 304(c).

"inherent advantage" of the competing type of carrier and cannot be ignored by the Commission.

Likewise, this Court affirmed, *per curiam*, a district court decision sustaining the Commission refusal to consider a rate question in a Section 207(a) proceeding where the application was opposed by motor carriers. *Railway Express Agency, Inc.* v. *United States*, 153 F. Supp. 738, 741 S.D.N.Y., 1957, affirmed 355 U.S. 270.

The Commission's judicially approved practice of refusing to consider the level of rates in an application proceeding, is based upon compelling considerations. To begin with, the entire structure of the Interstate Commerce Act treats separately the matters of service and rates. Moreover, the motor carrier certificate and permit provisions of Part II reflect the dominant Congressional purpose to eliminate destructive over-competition and thereby foster a healthy and stable transportation system. *American Trucking Associations* v. *United States*, 344 U.S. 298, 312–313. To permit rate competition to become a relevant and often decisive issue in application proceedings would be utterly inconsistent with the objectives and structure of the Act.

In addition, if the rates to be charged by an applicant are relevant to whether an application should be granted, then the lawfulness of the proposed rates can be challenged by protesting carriers, thus vastly broadening the range of relevant issues and evidence in the proceeding. The result would be to prolong

and make more expensive proceedings which already have been criticized as cumbersome.

Section 218(a) requires motor contract carriers to establish, file, and observe reasonable minimum rates and charges. Section 218(b) empowers the Commission to prescribe just and reasonable minimum rates for contract carriers and enumerates factors which the Commission must take into account in prescribing such rates; among such factors are the cost of the services rendered by the contract carrier and whether the prescribed minimum rate will give an advantage to any contract carrier in competition with any motor common carrier. These statutory provisions as to minimum rates of contract carriers illustrate the complete impracticability of considering rates in an application proceeding.

Moreover, the rate issue would often be completely illusory in that, if the application were granted, the applicant would not necessarily maintain its proposed lower rates; indeed actual operating experience might compel it to raise its rates. Thus, to give decisive weight to an applicant's proposed lower rates, the practical result of the lower court's opinion, is bound to result in the establishment of uneconomical or unnecessary transportation services—both inconsistent with the objectives of the National Transportation Policy.

One further matter requires comment. We have no quarrel with the district court's observation (R. 403) that "the goal of the national transportation policy encompasses all modes and all carriers subject to regulation." However, while it did not decide that

motor contract carriers are a distinct mode of transportation apart from motor common carriers, the district court's decision has that effect when it concludes that Reddish's "lower rates result from economies and advantages inherent in contract operations." All the reported cases concerning modes of transportation have dealt with the interrelation of rail, motor, and water carriers, and this Court has not split hairs between contract and common carriers within these groups so as to require the Commission to give weight to the advantages which one class of carriers in a distinct mode of transportation might have over another class within the same mode. See, *e.g. Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (rail vs. motor); *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (rail vs. water); *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60 (rail vs. motor).

The term "modes of transportation" in the National Transportation Policy is manifestly used in a broad context which distinguishes the modes by their fundamental physical characteristics. While there are differences between common and contract carriers by motor vehicle, the differences are not in physical characteristics, but in the nature of the holding out and the type of specialized service rendered. There are several different classifications of motor carriers, but all render a transportation service by motor vehicle over the highways. Contract and common carriage by motor vehicle are not separate modes of transportation. Rather they are subdivisions of the same mode. Common and contract carriage overlap to a

considerable extent, and the service which a contract carrier proposes may be duplicated by common carriers. Consequently, where it appears that a motor common carrier is able to furnish the same service as that proposed by a motor contract carrier applicant, no statute or case law negates the Commission's long-continued policy of refusing to give consideration to the desire of shippers to obtain a lower level of rates.

The court below fundamentally errs when it finds a deliberate and drastic change in the underlying purpose of the Motor Carrier Act and in the requirements of the National Transportation Policy. While Section 209(b), as amended in 1957, requires the Commission to consider the effect of a denial upon the supporting shippers, there is not a word in the history of the 1957 amendments to suggest that the Congress intended for the first time to require the Commission to go beyond service considerations in determining applications for contract carrier permits.

B. THERE IS A TOTAL LACK OF EVIDENCE TO SUPPORT A FINDING THAT THE PROFFERED LOWER RATES RESULT FROM ECONOMIES AND ADVANTAGES INHERENT IN THE PROPOSED CONTRACT CARRIER OPERATIONS

The court below stated (R. 409):

> We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this in-

> stance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.

There is not a scintilla of evidence in the record which would establish that the proposed lower rates result from economies, advantages, or more efficient operation of Reddish's contract carrier service. The record is completely devoid of evidence of Reddish's costs of operation or the costs of common carrier operations.[19] The absence of such evidence prevents any comparison which could result in the finding made by the district court.

The only materials as to contract costs which were presented to the court (not to the Commission) consisted of quotations from textbooks in the brief of the Department of Justice. Obviously, such materials do not constitute evidence upon which the lower court (or the Commission) could find that the proposed lower rates reflect economies and advantages of contract carriage *in this situation.*

Whether a contract carrier can render the same service as common carriers at lower rates than the latter depends upon circumstances which can vary from case to case. Often a contract carrier can

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[19] Some of which are irregular route carriers operating with only one terminal the same as Reddish (R. 282, 288).

provide transportation at rates less than common carriers because it refuses all except high-rated traffic; but even then a balanced operation, *i.e.*, loads in both directions, is necessary. Too much empty vehicle mileage, as where most of the traffic is in one direction, often will cause costs to soar.[20] Obviously, there are many considerations that must be taken into account before it can be ascertained whether a contract carrier is able to perform a particular transportation service profitably at rates lower than common carriers. It is not necessarily true that a contract carrier's cost will be lower than those of a common carrier where the service to be performed is similar. Whether Reddish could render a less-than-truckload service with multiple deliveries at truckload rates without assessing a stop-in-transit charge (which his tariff calls for but which he does not assess) would have to be determined by a detailed cost accounting analysis not present in this record.

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[20] Here inbound authority is also requested but only to permit Reddish to obtain a balanced operation. No claims were made by the shippers of inadequacy of such present service or that the rates therefor are too high.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed and the cause remanded with directions to dismiss the complaint.

Respectfully submitted.

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SEPTEMBER 1, 1961.

APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., provides as follows:

Sec. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411–12, Public Law 85–463, 85th Cong., provides as follows:

Sec. 209.

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent

authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided,* That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carriers shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit;

or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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